

March 10, 2000

Robert McKenna  
Steven J. Millemann  
P.O. Box 1066  
McCall, Idaho 83638

**BOARD OF LAND  
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Sup't of Public  
Instruction

RE: Reconsideration of Granting Lake Encroachment Application L-65-S-118G

Dear Mr. McKenna and Mr. Millemann:

The following is the Idaho Department of Lands' (IDL) final decision regarding the reconsideration of State of Idaho Lake Encroachment Application No. L-65-S-118G. Based on the following findings and conclusions, the administrative record and review of the relevant law and rules, IDL reaffirms its previous decision that the permit shall be granted with the following exceptions and conditions.

Those additions proposed to the boardwalk, that parallel the shoreline are not approved. The boardwalk surrounding the marina shall not exceed ten (10) feet in width. The platforms, which are proposed at the dimension of 24' by 24' shall be reduced to 20' by 20' in size. The applicant shall work with IFG on setting up a reasonable method of monitoring water quality, as it pertains to the hatchery surface water intake. IDL (Payette Lake Area Office) will serve as facilitator with this process.

**Findings of Fact**

1. On June 17, 1999, M Resorts, Ltd. (M Resorts) submitted a complete application for an encroachment permit. M Resorts proposes to construct a marina with an enclosing boardwalk, two 48-foot tall towers, a bridge, 18 double-wide slips and additional boardwalk paralleling the shoreline. The proposed project is located on Big Payette Lake, Section 8, Township 18 North, Range 3 East, Boise Meridian, Valley County, Idaho.
2. The application was advertised in the Star News on July 13 and July 22, 1999. A public hearing was held August 19, 1999.
3. On October 8, 1999, Mr. Will R. Pitman, Administrator of IDL's Lake Protection Act (LPA) program, issued Encroachment Permit L-65-S-118G to M Resorts. This permit gave permission to M Resorts to install and maintain the marina, boardwalk, towers, and bridge.
4. On October 19, 1999, Peggy L. Clemmer requested reconsideration of the application, pursuant to Idaho Code, Section 58-1306(d).

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5. On November 10, 1999, Mr. Will R. Pitman issued the Findings and Conclusions supporting his October 8, 1999 decision to issue the permit. A reconsideration hearing was held on December 21, 1999 by the undersigned-hearing officer. The applicant, through their attorney, Mr. Steven J. Millemann, provided testimony at the hearing. Mr. Don Anderson and Mr. Gene McPherson, representing IFG, provided testimony, as did Peter Johnson, representing the Big Payette Lake Water Quality Council (BPLWQC). Ms. Peggy Clemmer and Ms. Shirley Potter also provided testimony. Written documentation and verbal comments were received by IDL at the hearing. The hearing record remained open until January 5, 2000. Written comments were received by twelve (12) individuals; ten (10) of which did not testify at the hearing.
6. The construction of a marina, with enclosing boardwalk, towers and bridge was part of the proposal submitted to the city of McCall in 1998 by M Resorts. This proposal included improvements to the upland, as well as the marina plans. It was all submitted to the city under a Planned Development Process. Planning and Zoning, and the city council considered the proposal. Several hearings and public meetings were held. Through this process, upland renovations were approved by the city, public access to the boardwalk was planned for and some concerns of the city's and public were addressed. For example, the process resulted in the applicant changing the location of the towers from the East Side to the West Side of the marina. This provided better screening for the towers, which helped the aesthetic concerns; in addition, it moved the marina entrance farther from the river outlet. The city council approved the planned development August 13, 1998.
7. The applicant's proposal is for a marina available to the public on a first-come, first-serve basis. The boardwalk will be open for use and enjoyment by the general public.
8. Public opinion is split on the applicant's proposal. During the city's hearing process, fifteen (15) people testified, with ten (10), favoring the proposal and five (5) expressing concerns against this proposal. The McCall Chamber of Commerce expressed their support for the project during this process. During the reconsideration hearing process on the encroachment application, two (2) individuals spoke against the proposal and two (2) more submitted written comments against the plan. Eight (8) letters were received supporting the proposal and the IFG and Game and the Big Payette Lake Water Quality Council expressed their concerns with the project
9. Those members of the public who have testified in opposition to this project are not necessarily against the project itself, but rather the size and scope of the project. Their main concerns expressed are with the square footage of the project, construction and aesthetics of the towers and bridge, and safety concerns associated with the towers and bridge.
10. The BPLWQC was created by an act of the Idaho Legislature in 1993. The purpose of the Council is to study the condition of the Big Payette Lake and its watershed and prepare a Lake Management Plan. Considerable public involvement was included as part of the development of the Lake Management Plan. The Lake Management Plan was presented to and approved by the Legislature in 1998.

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11. In addition to the development of the Lake Management Plan, the duties of the Council include promoting the implementation of the plan by serving in an advisory capacity to those authorities with responsibilities affecting lake management or lake water quality. In promoting the plan, the Council accommodates private, public and commercial activities to the extent prudent and practicable. The Council's Plan Implementation Program states in part: "to minimize the impact of docks, 1) the area of docks and artificial surfaces should be minimal and serve only primary and essential functions, and 2) docks and artificial surfaces should be permitted only where an existing private or public need can be clearly documented."
12. The Council has testified as to their concern to the square footage of the boardwalk. They believe it to be excessive and further believe that it fails to respect the recommendations within the Council's Plan Implementation Program. The Division of Environmental Quality also strongly encourages the applicant to follow the guidelines contained in the Big Payette Lake Management Plan.
13. In response to the concern expressed by the BPLWQC regarding this project's potential impact on the lake water quality M Resorts hired Brian Liming, an environmental consultant, to look at the issues that had been raised by BPLWQC. The issues reviewed included periphyton growth on dock and boardwalk surfaces and its possible impact on water quality and the shading that these same structures will provide, as well as that possible impact on water quality. In summary, Mr. Liming's report indicated the net impact of the boardwalk and docks on attached algae growth and water quality is expected to be zero or not measurable.
14. Part of M Resorts' proposal includes adding additional structures and boardwalk along the existing shoreline. The boardwalk would extend water-ward of the Ordinary High Water Line. The IDL considers a walkway or boardwalk along the applicant's shoreline to be a non-water dependant use.
15. Representatives from the IFG expressed concerns that the construction and operation of M Resorts' proposed facility could increase the risk of additional sedimentation downstream in the North Fork of the Payette River. They would like to see studies conducted to evaluate the potential impacts from sediments or other potential contaminants, resulting from the proposed action, and that the proponent monitor its activities. Concern was also expressed regarding the potential increased risk to the water supply for the McCall Fish Hatchery. The hatchery lies along the North Fork of the Payette River southeast of M Resorts' proposal. The water intake for the hatchery is within the lake. The surface water intake lies just east of the proposed project, close to the East Side of the dam.

### Conclusions of Law

1. The Idaho State Board of Land Commissioners (Board) is designated in Idaho Code, Sections 58-104(9) and 58-103 to regulate, control and permit encroachments on, in or above the beds of navigable lakes in the State of Idaho. IDL is the administrative instrumentality of the Board. Idaho Code, Section 58-119.

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2. Payette Lake is a navigable lake as defined by Idaho Code, Section 58-1302(a). The proposal will affect the bed of Payette Lake. See, Idaho Code, Section 58-1302(b).
3. Pursuant to the Idaho Lake Protection Act (LPA), Idaho Code § 58-1301, et. seq, lake encroachments must be regulated to protect property, navigation, fish and wildlife habitat, aquatic life, recreation, aesthetic beauty and water quality; these concerns must be balanced against the navigational or economic necessity or justification for, or benefit to be derived from a proposed encroachment.
4. In addition to LPA, IDL must exercise its discretion pursuant to the Public Trust Doctrine as explained in paragraph 4 of Mr. Pitman's November 10, 1999 Conclusions of Law. See *also*, Idaho Code, Title 58, Chapter 12 (codification of aspects of the Public Trust Doctrine). This legal duty is independent of the LPA, and requires IDL to apply the pertinent balancing factors.
5. With respect to the role of the City of McCall in the subject application, it is true that the LPA preempts County or City Zoning authority with respect to activities below and artificial or natural high water mark (see Idaho Attorney General Opinion No. 83-6 (1983)). Conversely, IDL has no authority to regulate activities above the artificial or natural high-water mark. Obviously, many activities occur on Idaho lakes that impact lands both above and below the high-water mark. IDL also has a longstanding policy to cooperate with local governmental entities to the extent practicable in recognition of the fact, that projects may involve the uplands, as well as the lake. In the case at hand, the fact that the City of McCall has approved M Resorts planned development is a consideration in granting the permit
6. The Big Payette Lake Water Quality Council was created by Act of the Idaho Legislature in 1993 (see Idaho Code, 39-6601 – 6607). They have the responsibility to protect, preserve and, where necessary, improve the water quality of the lake, while accommodating private, public, and commercial activities to the extent prudent and practicable. The IDL must consider recommendations made by the BPLWQL in the Lake Management Plan and Plan Implementation Program. The recommendations within the Management Plan and Implementation Program are directed at water quality. BPLWQL's position is that the applicant's proposed encroachment must be scaled back in order to minimize impact on water quality. The council has also stated they do not object to the planned boat marina. In considering the intent of the legislature, the BPLWQC Lake Management Plan, and Plan Implementation Program, and the testimony of the BPLWQC, IDL believes the boardwalk must be scaled back in size. In looking at the testimony and considering safe use of the boardwalk, a maximum of ten (10) feet in width is prudent. A proportionant reduction is appropriate for the platforms. They would be reduced in size from 24' by 24' to 20' by 20'.
7. The use of a boardwalk along the shoreline is a non-water dependent use. The boardwalk or walkway could be built upon the adjacent upland. The use of the bed and waters of the lake, for the purpose of maintaining a walkway along the shoreline does not serve the best interest or benefit of the public and should not be granted.

8. The IFG has expressed concerns regarding sedimentation in the North Fork of the Payette River, downstream from the proposed encroachment, and contamination of the water to the point where it would present a risk to the surface water supply intake for the McCall Fish Hatchery. The concerns expressed are not based on any scientific data, but rather speculation that increased activity within the lake, in close proximity to the outlet dam, could have a negative impact. During the reconsideration hearing, the representatives for the IFG and the applicant expressed a desire and willingness to work cooperatively on project construction techniques and sediment control. The parties stated they would work with the Lake Reservoir Company on directing the flow through the dam. The plan is to divert more flow to the West Side of the dam, which will direct the flow away from the hatchery water intake. In addition, M Resorts has indicated a willingness to enter into a responsible partnership with the IFG regarding monitoring needs. The consequences of this project on water quality are largely unknown at this time. It is certainly reasonable for the applicant to participate in a cooperative monitoring project with the IFG regarding this project's impact on water quality. As a condition of granting this encroachment permit, therefore, it shall be the applicant's responsibility to work with IFG in setting up a reasonable method of monitoring water quality, as it pertains to the hatchery surface water intake. IDL (Payette Lakes Area Office) will serve as facilitator in this process.
9. Aesthetics and public safety have been raised as issues regarding the proposed towers and bridge. Aesthetics is an important factor in the consideration of an encroachment application by IDL. IDL is charged with balancing aesthetic factors when considering an encroachment permit under the LPA and the public trust doctrine. See Kootenai Environmental Alliance, Inc. v. Panhandle Yacht Club, Inc., 105 Idaho 622, 632, 671 P.2d 1085 (1983), Idaho Code §§ 58-1301, 1306(d), et. seq. In the case at hand, there were actually more people in favor of the total project than opposed. The towers and bridge are an integrated part of the boardwalk/marina project. They provide the opportunity for the public to completely circle the marina and do serve as a public amenity. Public safety is primarily the applicant's concern. In reviewing the applicant's proposal, IDL believes that they are now and will adequately address that issue.
10. Any Finding of Facts deemed to be a Conclusion of Law is hereby adopted as such; and Conclusion of Law deemed to be a Finding of Fact is similarly adopted as such.

#### Order

Based on the foregoing Findings of Facts and Conclusions of Law, I affirm IDL's decision in the November 10, 1999, Findings of Fact, Conclusions of Law and Order approving a Lake Encroachment Permit for Application No. L-65-S-118G with the following exceptions and conditions:

Those additions proposed to the boardwalk, that parallel the shoreline are not approved. The boardwalk surrounding the marina shall not exceed ten (10) feet in width. The platforms, which are proposed at the dimension of 24' by 24' shall be reduced to 20' by 20' in size.

Findings of Fact and Conclusions of Law

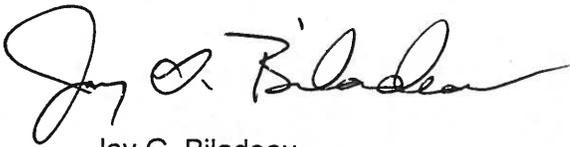
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The applicant shall work with IFG in setting up a reasonable method of monitoring water quality, as it pertains to the hatchery surface water intake. IDL (Payette Lakes Area Office) will serve as facilitator with the process.

The applicant, or other aggrieved party, who appeared at the December 21, 1999 hearing, may appeal this decision by filing a Notice of Appeal in district court in the county where the encroachment was applied for. See, Idaho Code, Section 58-1306. Any such appeal must be filed within thirty (30) days from the date of this decision.

Sincerely,

A handwritten signature in cursive script, appearing to read "Jay G. Biladeau".

Jay G. Biladeau  
Assistant Director  
Lands, Minerals and Range  
Hearing Officer

JGB:sm

